No. 87-505

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE, McCLELLAND ENGINEERS, INC., OCEANEERING INTERNATIONAL INC. AND HALLIBURTON COMPANY

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This brief is submitted on behalf of McClelland Engineers, Inc., Oceaneering International Inc. and Halliburton Company, in support of respondents Exxon Corporation and Esso Tankers, Inc. Both petitioners and respondents have consented in writing to the filing of this *amicus curiae* brief. *Amici* have filed with the clerk of this Court letters from counsel for petitioners and respondents consenting to the filing.

INTEREST OF AMICI CURIAE

Petitioners herein are the plaintiff, Chick Kam Choo, and also her attorneys, Benton Musslewhite, Esq. and Joseph C. Blanks, Esq. The injunction in question operated against Choo's attorneys as well as Ms. Choo. (Brief of Petitioners, p. 2, fn. 1.) Petitioners correctly cited a conflict between the Fifth Circuit's opinion, below, and the Ninth Circuit's opinion in *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987) *pet'ns. for cert. filed sub nom.,*

Crowley Maritime Corp. v. Zipfel, No. 87-1122 (Jan. 4, 1988) and *Halliburton Co. v. Zipfel*, No. ____ (Jan. 12, 1988) (*Zipfel*).

Amici are among the defendants/appellees in the *Zipfel* case. Petitioner herein, Benton Musslewhite, Esq. is also the lead attorney representing the plaintiffs/appellants in *Zipfel*. On January 12, 1988, *amici* filed a petition for certiorari in *Zipfel*, based on the same conflict which apparently led this Court to grant the petition herein. *Amici* also requested that this Court consolidate the two cases.

Petitioners' brief on the merits relies extensively on the Ninth Circuit opinion in *Zipfel*. As parties involved in all the proceedings in the district court and in the Ninth Circuit in *Zipfel*, *amici* are in a unique position to comment on the proceedings in that case, on the reasoning of the Ninth Circuit, and on the kind of chaotic forum-shopping that a reversal of the Fifth Circuit's decision herein would authorize. Moreover, *amici* are vitally interested in the disposition of the instant case because it is they who would immediately suffer from the rule that petitioners advance.

SUMMARY OF ARGUMENT

The Fifth Circuit, after a careful and thorough analysis, concluded that

> "Once a court of competent jurisdiction has squarely passed on an issue fairly mooted between the same parties, on the merits of the cause or otherwise, the issue may not be relitigated." (*Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 325 (5th Cir. 1987) *cert. granted*, ____ U.S. ____, 108 S.Ct. 343 (1987) (*Choo*).)

The opinion in conflict, *Zipfel*, was not correctly decided. As in *Choo*, the district court in *Zipfel* had dismissed foreign plaintiffs' actions under *forum non conveniens*, and then enjoined them from relitigating the same issue in any other U.S. court. The Ninth Circuit essentially glossed over the injunction issue at the close of its opinion. Unlike the Fifth Circuit, and without its

thorough analysis, the Ninth Circuit reversed the injunction against the foreign plaintiffs.

The reasoning that was contained in the Ninth Circuit opinion was erroneous. The court ruled that the district court's judgment was one which it was not entitled to "protect or effectuate," by characterizing that judgment, obtained after years of exhaustive litigation, as a ruling on a mere "procedural point." (*Zipfel*, *supra*, 832 F.2d at 1488.) The court held that the injunction against the *American* plaintiff was proper as "necessary in aid of the court's jurisdiction" since, under the Ninth Circuit's ruling, the district court would retain jurisdiction. However, the Ninth Circuit reversed the injunction against the *foreign* plaintiffs, since the Ninth Circuit affirmed their dismissal. Therefore, according to the Ninth Circuit, the district court no longer had jurisdiction needing "aid." That result is not only anomalous, but contrary to the Ninth Circuit's own precedent holding that "a district court retains jurisdiction to enforce the judgment it enters." (*Wood v. Santa Barbara Chamber of Commerce Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984).)

Zipfel presents a glaring example of the chaos the Fifth Circuit seeks to avoid. The blatant forum shopping in *Zipfel* began in a federal court in Texas, moved to a federal court in California, then on to a Texas state court. If this Court allows, it may even move to a fourth inconvenient forum in a California state court. If *Choo* is reversed, petitioners could conceivably try every state and federal court in the land in an effort to find one sympathetic judge.

I

ARGUMENT

INTRODUCTION

In both *Zipfel* and *Choo*, petitioner Benton Musslewhite, Esq. filed actions on behalf of foreign workers who were injured or killed in the course and scope of their employment in connection with a vessel. The plaintiffs in both cases alleged causes of action under the Jones Act (46 U.S.C. § 688), Death on the High Seas

Act (46 U.S.C. §§ 761, et seq.) and general maritime law. The district courts in both cases ruled that American law did not apply, and dismissed the actions under the *forum non conveniens* doctrine, ruling that the cases should be prosecuted in Southeast Asia, where the alleged wrongful acts occurred. In both cases, the district court enjoined plaintiffs and their attorneys from prosecuting the actions in Texas state court, or in any other American court.

In both *Zipfel* and *Choo*, the issue is whether the district court had discretion to enjoin the plaintiffs from proceeding with their actions in Texas state court, or in any other American court.

The Fifth Circuit, in a carefully reasoned opinion, affirmed the granting of the injunction. The Ninth Circuit's opinion affirmed the district court's decision that U.S. law did not apply to the foreign plaintiffs' claims, and its dismissal of their actions under the *forum non conveniens* doctrine, while reversing the *forum non conveniens* dismissal of the American. The Ninth Circuit then affirmed the injunction of the American, but reversed the district court's injunction against the foreign plaintiffs, in a very brief discussion at the close of the opinion. (*Zipfel v. Halliburton Co.*, 820 F.2d 1438 (9th Cir. 1987).)

Amici petitioned the Ninth Circuit for rehearing, citing the just issued Fifth Circuit opinion in *Choo* on the injunction issue. As petitioners' brief notes (in footnote 20), in a modified opinion, the Ninth Circuit erroneously found that its decision was not in conflict with the Fifth Circuit's well reasoned opinion, and thus denied rehearing. (*Zipfel v. Halliburton Co.*, *supra*, 832 F.2d 1477.)

Amici filed a petition for certiorari in the *Zipfel* case, based on the conflict between the Fifth and Ninth Circuits. This Court has not yet acted upon *amici*'s petition.

II

ZIPFEL WAS ERRONEOUSLY DECIDED

The Fifth Circuit recognized the blatant forum shopping in which petitioner Musslewhite and his clients were engaging. The

decision recognized that the district court was well within its power in protecting and effectuating its judgment of dismissal, when it enjoined petitioners from taking their forum shopping efforts any further. The court of appeals properly decided that

> "It is time for this litigation to come to an end in the United States and return to Singapore, where it belongs." (*Exxon Corp. v. Chick Kam Choo, supra*, 817 F.2d 307, 325.)

The court concluded:

> "Once a court of competent jurisdiction has squarely passed on an issue fairly mooted between the same parties, on the merits of the cause or otherwise, the issue may not be relitigated." (*Id.*, at p. 314.)

The Ninth Circuit opinion indicates that, unlike the Fifth Circuit, the Ninth Circuit relegated the important injunction issue to an afterthought, after addressing the numerous other issues presented by that appeal. This Court should not adopt the Ninth Circuit's erroneous holding, but should affirm the Fifth Circuit.

A. The Procedural History and Background of *Zipfel*

Zipfel arose out of an air crash in Pekan Baru, Indonesia. The plane's passengers were workers employed on a stationary oil drilling vessel, permanently stationed in Indonesian territorial waters. The workers were en route from Singapore to the vessel. *Zipfel* involved actions by, or on behalf of, five of the workers injured or killed in that Indonesian air crash. *Amici* are the American parent corporations of three foreign companies, each of which provided, in its capacity as a subcontractor to the vessel, one of the injured or killed foreign workers.[1]

Petitioner Musslewhite's forum shopping excursion in *Zipfel* began in the Texas federal courts. He first filed lawsuits on behalf

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[1] In the district court, *amici* moved for summary judgment on the basis that their subsidiaries, and not *amici*, employed the workers. In light of the *forum non conveniens* dismissal of the actions, *amici* did not continue to pursue that theory.

of his clients in the U.S. District Court for the Eastern District of Texas. He then voluntarily dismissed those suits, and refiled in a second forum, the U.S. District Court for the Northern District of California.

The parties in *Zipfel* litigated exhaustively for years in the Northern District of California over the choice of law and *forum non conveniens* issues. Plaintiffs conducted extensive discovery attempting to establish a nexus between the U.S. and the air crash. The first district judge assigned to the cases ruled that U.S. law applied to all of the cases (some brought by foreign plaintiffs, some by Americans). The cases were then assigned to a second district judge. *Amici* and the other defendants moved for reconsideration of the denial of their motions on the basis that the first ruling was clearly erroneous, and the second judge was not bound to follow his predecessor into error. (*Castner v. First National Bank*, 278 F.2d 376, 380 (9th Cir. 1960).) The second district judge did reconsider the motions, and ruled that U.S. law did not apply to the foreign plaintiffs' claims, but did apply to the Americans'. The court then dismissed all of the cases under the *forum non conveniens* doctrine, ruling that the cases should be prosecuted in Singapore or Indonesia, not in the United States. (*Sherrill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021 (N.D. Cal. 1985).)

Some of the district court actions involved in *Zipfel* settled during the years of litigation. The actions of four foreign plaintiffs and of one American, all represented by petitioner Musslewhite, did not settle. Petitioner Musslewhite also chose not to refile his clients' actions in Singapore or Indonesia, as suggested by the district court. Instead, he activated actions filed in yet a third U.S. forum, the Texas state court, on behalf of his clients.

At that point, *amici* and the other defendants moved in the district court for an injunction against petitioner Musslewhite, his co-counsel and his clients pursuing their actions in Texas state court, or in any other American court. The district court issued that injunction.

By failing to file in Southeast Asia, petitioner Musslewhite allowed the dismissals of his clients' lawsuits to become final

judgments. He then filed appeals in the Ninth Circuit on behalf of the five plaintiffs, which appeals were consolidated as *Zipfel*.

There were numerous issues raised on that appeal. Those issues included whether the second district judge had the power to reconsider the first district judge's ruling, the Jones Act/choice of law factors, whether the district court had the power to dismiss an American's Jones Act claim under the *forum non conveniens* doctrine, the application of the *forum non conveniens* factors set forth in this Court's decisions in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), as well as the injunction issue.

At oral argument and in its opinions in *Zipfel*, the Ninth Circuit focused on the propriety of the dismissal of the actions. The court first held that the second district judge was within his discretion in reconsidering the first judge's decision. The court then affirmed the district court's ruling that U.S. law did not apply to the foreign plaintiffs' actions, and affirmed the *forum non conveniens* dismissal of those actions. The court also reversed the *forum non conveniens* dismissal of the American plaintiff, holding that the district court had no power to dismiss an American's action, to which the U.S. Jones Act applied, under that doctrine. Finally, at the close of its opinion, the Ninth Circuit briefly glossed over the injunction issue, without substantial analysis, affirming the injunction against the American, but reversing the injunction against the foreign plaintiffs. (*Zipfel v. Halliburton Co., supra*, 820 F.2d 1438.)

Amici and other *Zipfel* defendants/appellees filed a petition for rehearing in the Ninth Circuit, asking the court to reconsider its reversal of the injunction in light of the newly issued conflicting opinion of the Fifth Circuit. As petitioners' brief notes (at p. 26, fn. 20), the Ninth Circuit's failure to recognize the conflict was the result of a "faulty premise" that the basis for the Fifth Circuit's ruling was that Chick Kam Choo was "simply bound by the earlier judgment which enjoined her from relitigating the case in state court." (*Zipfel v. Halliburton Co., supra*, 832 F.2d 1477, 1488.) As the Ninth Circuit's "faulty premise" led it to find no conflict, the court avoided the necessity of re-examining its decision on the injunction issue. Thus, based on its misunder-

standing of the Fifth Circuit's opinion, the Ninth Circuit refused to analyze the issues raised.

If this Court does not grant the petitions for certiorari filed by *amici* and other defendants/appellees in *Zipfel*, and reverse the Ninth Circuit's judgment, petitioner Musslewhite and his clients will be free to continue their blatant forum shopping. Petitioner Musslewhite had advised *amici* that, if this court allows, he will most likely refile his clients' actions in yet a fourth inconvenient U.S. forum, a California state court.

B. Petitioners' Citations Of *Zipfel* Do Not Support Reversal Of The Fifth Circuit

Petitioners cite *Zipfel* in support of their proposition that the exception to the Anti-Injunction Act (22 U.S.C. § 2283), which allows injunctions which are "necessary in aid of the district court's jurisdiction" ("aid of jurisdiction" exception) "plainly does not apply." (Brief for Petitioners, p. 14, fn. 9.) They further cite *Zipfel* throughout their brief in support of the proposition that the exception to that statute allowing injunctions to "protect or effectuate judgments" (relitigation exception) also does not apply. This Court should not adopt the *Zipfel* holdings cited by petitioners.

The Ninth Circuit apparently disregarded the fact that the district court's rulings on the *forum non conveniens* and related issues came only after a tremendous expense of time, money and energy, involving literally thousands of hours of attorneys' time over several years. The Ninth Circuit reduced all of that effort to prevailing on a "procedural point." Without any further analysis, the Ninth Circuit ruled that the district court's judgment was not one which it was entitled to protect or effectuate by enjoining petitioner Musslewhite and his clients from relitigating the same issue in another court. (*Zipfel v. Halliburton Company*, *supra*, 832 F.2d 1477, 1488.)

The Ninth Circuit's ruling that the relitigation exception did not apply was not only made without thorough analysis, it was contrary to this Court's holdings that labeling decisions as "procedural" versus "substantive" is inappropriate as a means for deciding cases. (*Hanna v. Plumer*, 380 U.S. 460, 465-6 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-9 (1945).) This Court should now rule squarely that parties who have fully litigated an issue to its conclusion should not be free to litigate the same issue over and over, *ad infinitum*.

While the Ninth Circuit ruled that the "aid of jurisdiction" exception did not apply to the injunction against the foreign plaintiffs, it also held that the exception applied to the injunction against the American. The court affirmed the injunction against the American under that exception, since, under the Ninth Circuit's ruling, the district court would retain jurisdiction. It reversed the injunction against the foreign plaintiffs because, once the district court dismissed their suits, it no longer had jurisdiction. (*Zipfel v. Halliburton Co.*, *supra*, 832 F.2d 1477, 1488.) Thus, the Ninth Circuit's language would support the proposition that the injunctions at issue would be proper, as "necessary in aid of the court's jurisdiction," as long as they were issued by a district court with jurisdiction.

The Ninth Circuit's holding that the "aid of jurisdiction" exception did not apply to the injunction of the foreign plaintiffs' claims cannot withstand scrutiny. As a practical matter, it creates a bizarre anomaly. *Amici* might have filed a single motion in the district court, asking the court to make two rulings, one dismissing the actions, and one enjoining petitioner Musslewhite and his clients from prosecuting their actions in any other U.S. forum. Under the Ninth Circuit's ruling, the district court could then have properly issued the injunction against the foreign plaintiffs, in the same order in which it granted the motions to dismiss. However, *amici* and the other defendants/appellees in *Zipfel* did not move for the injunction until they learned that petitioner Musslewhite had activated his clients' Texas state court actions, rather than follow the district's court's suggestion that he refile the actions in Southeast Asia. Since the motion was made after the court had declined jurisdiction, the Ninth Circuit ruled that any injunction against the foreign plaintiffs and their attorneys was improper.

In addition, the Ninth Circuit's holding that, having dismissed the cases, the district court divested itself of jurisdiction to enjoin the parties from relitigating the issue, is contrary to settled law,

including the Ninth Circuit's own prior decisions. The Ninth Circuit has held: "A district court retains jurisdiction to enforce the judgment it enters." (*Wood v. Santa Barbara Chamber of Commerce, Inc., supra*, 705 F.2d 1515, 1524. The Fifth Circuit is in accord. (See *Southwest Airlines Company v. Texas International Airlines*, 546 F.2d 84, 90 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977), holding that an action for injunction to enforce a federal judgment is supplementary or ancillary, and therefore the jurisdiction follows that of the original suit. The *Southwest Texas Airlines* case was cited with approval by the Ninth Circuit in *Midkiff v. Tom*, 725 F.2d 502, 504 (9th Cir. 1984), reversed (on other grounds) 467 U.S. 229 (1984).)

Petitioners' reliance on *Zipfel*, at p. 21, fn. 16 of their brief, is badly misplaced. They note that *Zipfel* held that it was proper for the second district judge to reconsider the first judge's decision denying the *forum non conveniens* motions, as the second district judge was not bound to follow his predecessor into error. (*Zipfel v. Halliburton Co., supra*, 832 F.2d 1477, 1481.) Petitioners, however, seek to use that holding to support the proposition that a district court cannot enjoin parties from relitigating, in another forum, an issue that has been finally and conclusively decided, without error. That is a specious argument.

While a district judge is free to correct the error of his predecessor judge in the same action, that does not imply that a litigant, having lost in the district court *and* in the court of appeals, may then try again in a state court on the identical issue. The Fifth Circuit properly held that a district court may enjoin relitigation of an issue fully litigated and finally decided.

III

REVERSAL OF THE FIFTH CIRCUIT WOULD HAVE CHAOTIC IMPLICATIONS

The history of the *Zipfel* litigation painfully demonstrates the practical effect that reversing the Fifth Circuit would have. Reversal would authorize enterprising forum shoppers such as petitioner Musslewhite to move freely from one inconvenient U.S.

forum to another, in attempts to prosecute their clients' foreign claims.

In Chick Kam Choo's case, the defendant is an oil company doing business nationwide. Presumably, she could obtain *in personam* jurisdiction over Exxon anywhere in the United States. If the Fifth Circuit were reversed, even were the Texas state court also to dismiss Chick Kam Choo's suit, nothing would prevent petitioners from refiling their lawsuit *ad infinitum*, in the courts of all 50 states and all of the federal districts, in the hopes of finding one sympathetic American judge to agree to hear her case. It is hard to imagine a more bizarre or wasteful procedure, or one less calculated to "protect or effectuate the judgment" of the first court to rule.

Petitioners acknowledge that, following the most recent amendment to the Anti-Injunction Act, the dissenting opinion of Mr. Justice Reed in *Toucey v. New York Life Insurance Co.*, 314 U.S 118 (1941) represents the intent of Congress in enacting the present Anti-Injunction Act. (Brief of Petitioners, p. 25, fn. 19.) The language of Mr. Justice Reed's dissent, which petitioners quote at page 25 of their brief, strongly supports affirming the Fifth Circuit:

> "The alternative [to allowing an injunction] is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication . . . [W]e find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field. . . . A decree forbidding a defeated party from setting up any right, anywhere, based upon claims adjudged is the usual form where injunctions are appropriate for determining controversies.
>
> (*Toucey v. New York Life Insurance Co., supra*, 314 U.S. 118, 144-5 (Reed J., dissenting.))

Justice Reed could have been describing either the *Choo* or the *Zipfel* case. The alternative to affirming the Fifth Circuit would be federal judgments, such as the judgments in *Choo* and *Zipfel*, entered after years of expense in money and energy, coming to nothing final. Just as Justice Reed was not alarmed by affirming an injunction under these circumstances, this Court should now "find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field." Accordingly, this Court should affirm the Fifth Circuit, and affirm the injunction of the district court in Texas.

CONCLUSION

The Ninth Circuit's decision in *Zipfel* was erroneous, and lacked the thorough analysis of the Fifth Circuit. Thus, this Court should not adopt the Ninth Circuit's holding in order to overturn the Fifth Circuit.

A reversal of the Fifth Circuit would authorize blatant and endless forum shopping, resulting in chaos. This Court should have no cause for alarm in confirming that Congress intended to forbid parties who have litigated for years over an issue, from relitigating the identical issue in another forum. Accordingly, *amici* respectfully request that this Court affirm the decision of the Fifth Circuit.

Respectfully submitted,

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